IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION, *et al.*,

Petitioners,

v.

JAMES M. NAMEN, *et al.*, AND
THE CITY OF POLSON, MONTANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
and
BRIEF *AMICUS CURIAE* OF MONTANA INTER-TRIBAL POLICY BOARD

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Montana Inter-Tribal Policy Board moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. The written consent of the petitioner is annexed. The consent of the respondents was not secured. The respondents have until October 6, 1976, within which to file their brief in opposition and accordingly will have

ample time to comment upon this brief, should they deem it appropriate.

INTEREST OF AMICUS CURIAE

The Montana Inter-Tribal Policy Board is a voluntary organization composed of the seven Indian tribes in Montana, each with a reservation—the Assiniboine and Sioux Tribes (Fort Peck Reservation), the Crow Tribe, the Confederated Salish and Kootenai Tribes (Flathead Reservation), the Northern Cheyenne Tribe, the Blackfeet Tribe, the Rocky Boy Tribe and the Gros Ventre and Assiniboine Tribes (Fort Belknap Reservation). The Inter-Tribal Policy Board was organized to protect and promote the interests of the Indians of Montana. The United States has guaranteed to each tribe, by treaty and statute, rights in property that are inalienable without the consent of Congress (25 U.S.C. 177). The approach of the courts below opens the way to negate the statutory protection and places tribal rights in jeopardy whenever a conflict arises between the non-Indian claimant of tribal land and a tribe.

Respectfully submitted,

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September 1976

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Indian tribes understand that land forming the beds of navigable waters on Indian reservations established before a State was admitted into the Union is the property of the tribes. That property is inalienable without the consent of Congress (25 U.S.C. 177).

The reason for making tribal property inalienable was explained in *Leavenworth, Etc. R.R. Co. v. United*

States, 92 U.S. 733, 742 (1876) where the Court stated:

> "* * * Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier, with the ultimate fee vested in the United States coupled with the sole right to buy that right, in case the Indians were willing to sell, they were safe against intrusion if the Government discharged its duty to a dependent people. * * *"

The courts below construed the controlling treaty and statutes to bypass the absolute protection of Section 177. The courts adjudicated title in the nonIndians out of concern that otherwise a "grievous injustice" would be done to the people who had used tribal property over a long period of time. (Pet. App. 3a, 28a-29a.)

The question before the courts was one of title. The answer turned on the meaning of treaty and statutory language. This brought into play the principle that Indian treaties and statutes are to be liberally construed with doubts and ambiguities resolved in favor of the tribes. This Court termed that principle an "eminently sound and vital canon." *Northern Cheyenne Tribe v. Hollowbreast*, ____ U.S. ____, 48 L.ed.2d 274, 280, n. 7 (1976). Recently the circuit court emphasized that the rule is not a mere canon of statutory construction "easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the Nation's obligations to the conquered Indian tribes." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (C.A. 9, 1975).

The decision below does not rest on an application of that principle, but rather on the feeling that a ruling in favor of the tribe would result in a "grievous injustice." If the degree of "injustice" is to control, the tribe should have prevailed. He who claims tribal property, loses nothing when the true owner is recognized. He cannot lose what he did not own. The injustice is to the tribes if the nonIndian is awarded tribal land because he used it for so many years.

Indian tribes rely, as they have a right to rely, on the protection afforded by 25 U.S.C. 177, the immunity from the bar of limitations, laches and estoppel, and on the well established canons governing the construction of Indian statutes. All these safeguards are designed to underwrite the promise of the United States to carry out its treaty obligations.

Now that tribes are finally being afforded the opportunity to exercise self-determination and to use their own property, they are confronted with a judicial approach that measures the right to tribal land by the subjective test of injustice to the nonIndians who may have used the tribal land for many years. The lower courts must be reminded of their obligation to follow the mandates provided for the protection of Indian tribes. Otherwise, the treaties, the statutory prohibition against alienation and the high sounding canons of judicial construction, are without life.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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